No. 06-819

In The Supreme Court of the United States

MARSHALL K. FLOWERS and ANNA FLOWERS,

Petitioners,

v.

UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHLWEILER, Captain,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS MARSHALL K. FLOWERS AND ANNA FLOWERS' REPLY BRIEF TO RESPONDENT ~~FORT JACKSON~~ FEDERAL ~~CREDIT UNION~~

MARSHALL K. FLOWERS
P.O. Box 29632
Honolulu, Hawaii 96820
Phone: (808) 256-2279

ANNA FLOWERS
50 Albert Street
Goodwood 5034
Adelaide, South
Australia

011 61 88 272-2774

Petitioners Pro Se

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY FACTS AND THE ARGUMENT.....1

II. FACTUAL BACKGROUND.....3

A. The Article 32 Hearing and Subsequent Article 15.....5

B. The Non-Judicial Proceeding procedure (Article 15).....9

C. The Commanding General's Withdrawal of the Article 15 and Subsequent Article 32 Hearing.....11

D. The Army's Bar to Reenlistment as Punishment and Utilization of Withdrawn Article 15 in Support.....15

III. ARGUMENT.....19

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Case

Feres v. United States,
340 U.S. 135 (1950).....1, 2, 19

Statues

United States Code § 3401.....1

United States Code § 3407.....6,7

32 Code Federal Regulation

Part 275.....1, 19

Part 504.....1, 7, 17, 18, 19

Regulations

Army Regulation 27-10, para 3-18.....8, 10, 11

Army Regulation 190-6 ..... 1, 19

Army Regulation 601-280.....18, 19

M.C.M. (1995) Part V-2.....7, 10

PETITIONERS MARSHALL K. AND ANNA FLOWERS REPLY BRIEF FOR.TO FEDERAL RESPONDENTS

1. INTRODUCTION AND SUMMARY FACTS AND THE ARGUMENT

The Government, rather than address head on the substantial legal questions raised by this petition, the Government attempt to recast Petitioners' claims as nothing more than gripes about routine Army personnel decisions. *See Govt. Br.* 2. Respectfully, this malicious attempt to obstruct the Court's attention notwithstanding, the central question raised by this petition remains whether this Honorable Court should hear Petitioner's challenge as to whether the lower court was correct in applying Feres to dismiss their claim for the Army's violation of 12 U.S. C. 3401 et. Seq.,. the Right to Financial Privacy Act. Particularly, relevant is whether petitioner's RFPA claims are legally precluded or Feres used to excuse the Army's liability pursuant to RFPA and relevant statues and regulations; 32 CFR §§ 275 and 504 and AR 190-6 Obtaining Financial Information from Financial Institutions. The Government's brief (Govt. Br.) states that Petitioner alleges that "the Army conspired to press charges against Marshall Flowers, and thus constituted a willful violation of the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 et. Seq.". Govt. Br. at 2.

Respectfully, this statement mischaracterized the sequence of event that caused and contributed to Maj. Ohlweiler's issue of unauthorized subpoenas. But since truth requires revelation of facts, events, and evidence, the Government implication of Feres constitutes more so a denial of discovery than in this case interference with "military discipline." Clearly, as the petition sets forth, this case involves three separate defendants; the Department of the Army ("Army), Fort Jackson Federal Credit Union ("FJFCU"), and First Hawaiian Bank "FHB"). Each set of facts regarding subpoenas issued. Petitioners cooperated in all discovery matters. Defendants reigned free to conduct necessary

discovery; from Mr. And Mrs. Flowers deposing them for 14 and 8 hours respectively, to discovery of their tax records, and surprising not implicating "military discipline" when the financial institutions deposed military officers; General James Hill, Maj. John Ohlweiler, and Capt. Randy Ohlweiler.

The essence of these military officers' testimony to financial institutions involved "military discipline" testimony against SGM Flowers; except here "military discipline" is not implicated.

If the term "conspiracy" must be utilized as in the Gov. Opps. Br., it results from the conspiracy of defendants to deny petitioners safeguard of their financial records and contrary to law discriminates in application of law. The Government conspired with defendants utilizing Feres as a bar to litigating their claims. First, absent notice, the court allowed petitioners attorney to withdraw (CR 266), particularly and most importantly during the discovery period where and when the scheduling order provided for deadlines and after attorney with less than five month of representation cost more than $50,000.00 claimed in Attorney fee. The question before the Court appears from the Government perspective relates more so to military camouflage (conceal facts to blend in) than questions of "military discipline."

The fundamental question presented by this case is who gets to decide who is entitle to enforcement of the law? The Government brief failed to cite one allegation upon Ms. Flowers that encompass military discipline.

Questions raised before this Court are whether the lower Court contrary to law properly dismissed petitioners RFPA claims and whether the court was correct in granting summary judgment, in lieu of Petitioners Federal Rules of Civil Procedures,, Rule 56(f) motion to continue pending discovery and whether the lower court correctly applied Feres as precluding Petitioner from pursuing their claims? Whether the Army's violation of the RFPA implicates "military discipline? The Defendants offer no

arguments and present no substantial authority to justify service members in the District of Hawaii and in accordance with statutory law and regulation, the enforcement of the law when violated, particularly when the Army promulgates regulations but fail to follow them.

II. THE FACTUAL BACKGROUND

Petitioners Marshall K. Flowers ("Flowers") and Anna Flowers ("Anna") (collectively referred to as "Petitioners") dispute some facts as alleged by the Government but reserving their continued objection to evidenced (CR 350/372) submitted in the lower court in support of First Hawaii Bank's ("FHB") Motion for Summary Judgment, also, and joined by FJFCU and as summarized by the U.S District court for the District of Hawaii, in its Order Granting In Part and Denying In Part Motion for Summary Judgment (see Pet. App. 63a-69a; CR443) and offered by Fort Jackson Federal Credit union in its response brief ("Br. Resp. FJ"), petitioners respond as follows:

It is undisputed Flowers was apprehended for alleged shoplifting at Schofield Exchange. Thereafter records, files, investigation reports, and evidence constructed misrepresented facts through improper acts (concealment of statements and exchange receipts; merchandise boxes absent contents obtained Navy Exchange, Pearl Harbor and sending boxes to CID laboratory for fingerprint identification; making a false affidavits in support of obtaining a search authorization; exceeding the scope of authority vested in the search authorization; seizure of the Flowers property; tampering with seized property by placing Barber's point price stickers on video films; Major Ohlweiler's improper influence in preferral of charges; impeding military justice through improper administration and assignment of military officer to render a partial Article 32 investigation report; unauthorized use of subpoenas to obtain financial records and its eventual cover up; the Army's failure to dismiss charges with prejudices; harassments, intimidation to force acceptance of non-

judicial punishment (Article 15), MG Hill withdrawal of Article 15 punishment and subsequent use of the withdrawal Article 15 as the basis for the Bar to Reenlistment; and
Maj. Ohlweilers' positions that made him unaccountable for his actions.

Unfortunately, the lower court suspended Petitioners right to equal treatment, elevated Maj. Ohlweiler to stature bigger than the law. Needless to say, no law is beneath man and no man is less accountable.

Petitioners reserved all rights to objection of Army's violation of their constitutional rights pursuant to the Fourth, fifth, and Fourteenth Amendment. First Hawaiian Bank receipt of and use prejudicial military records joined by FJFCU. (CR-95). Maj. Ohlweiler and 25th Infantry Division CID agents' campaign of unaccountability allowed obstruction of justice, concealment of sworn statements and evidence through exclusion from the blotter[1] and final CID Report. (CR 350/372) [2] Through concealment of evidence (exchange receipt), particularity Ms. Raymondi Kunasaki's statement, Sgt. Ebert's' omission and inclusion of false information caused a military judge in Fort Lewis, Washington to issue a search authorization for agents to enter and seize the Flowers personal property from their military quarters at 617 (B) Valley View Loop, AMR, Honolulu, Hawaii. The Flowers filed a motion in limine (Case #01cv412, CR-77) in the lower court to prevent prejudicial use of evidence obtained from the seizure.

In efforts to silence the Flowers regarding obstruction of justice and seizures of properties, Maj. Ohlweiler assignments as 25th Infantry Division Trial Services Office, Army Litigation Branch and Special Assistant to the U.S. Attorney ("SAUSA", State of Hawaii positioned him to improperly influenced the fair

---

[1] A blotter report is military policy/ serious incident report provided commanders of incidents or serious activities of service members within a command within a twenty-four hour period.

[2] "CR" indicates the Court Record in the U.S. District Court and the numbers refer to the court docket number for both consolidated cases.

administration of justice through Capt. Joseph Hall, Commander, HHC 25th Infantry Division preferral of charges against Flowers for alleged violation of Article 121 (Larceny) and Article 81(Conspiracy), Uniform Code of Military Justice (UCMJ"); through a partial Article 32 hearing ("hearing") [3] as means to intimidate, harass, deny due process and force acceptance of non-judicial punishment and ultimately force Flowers' retirement; through litigation in the U.S. District Court for his use of unauthorized subpoenas to obtain the Flowers financial records in violation of Army Regulation and statue; and finally to deny discovery by using Feres v. United States, 340 U.S. 135 (1950). .

A. The Article 32 Hearing and Subsequent Article 15

It is undisputed an Article 32 hearing (hearing) convened on June 25-26 1998 attended by Charles R. Gittins [4] ("Mr. Gittins) who arrived in Hawaii from Virginia June 23, 1998. Prior to the hearing, Flowers encompassed and endured intimidation, harassment, prosecution and severe emotional depression as a result of the failure of command to investigate and military counsel, Maj. Denise Lind sober commitment to leaving Hawaii and attend graduate school than preparing to investigate and defend the charges; as defined by Maj. Ohlweiler "Make Flowers go away." The night before the scheduled hearing, Flowers professed innocence but agreed to accept disposition by non-judicial punishment and retire on conditions that the Army return his hard drive and property seized from military quarters; the Army discontinue its campaign of harassment and dismiss all charges with prejudices. Flowers signature appeared on a document titled "Memorandum of Agreement for Alternate

---

[3] The primary purpose of the investigation required by Article 32 hearing is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. R.C.M 402 discussion.

[4] Mr. Gittins is a military attorney with residence in Virginia that defended military members around the world.

Disposition" ("MOA- 1),"(CR-350/372)[5] and according to counsel "collateral" but non-binding. Id. In relevant part the memo stated:

3. The Government shall withdraw with prejudices all charges against SGM Flowers upon imposition of Article 15, UCMJ Punishment. (emphasis added)

4. The government shall return to SGM Flowers all property seized from his quarters on 18 December 1998, with the exception of those items identified on the Government Bill of Particulars provided to the defense and two Casio Portable Televisions that were seized without batteries installed.

The General Court-martial convening Authority or no other signature appeared on the document, dated 26 Jun 98. Id.

Major Timothy Ryan, HHC 25th Infantry Division, G-1, presided over the hearing as Investigating Officer ("IO"). Parties in attendance are identified in the IO report.(CR-350/372). Other persons that attended the hearing but not identified in the report were Sgt. Francis McBride[6] and two civilian female witnesses that entered the hearing on June 25, 1998, several minutes prior to Capt. Ohlweiler's announcement, "let the record reflect that Capt.Bagwell, assistant trial counsel has arrived. IO Report, 16 Jul 98 Id. (ephasis added).

Prior to the hearing, unknown and absent notice to the Flowers as required by Right to Financial Privacy Act ("RFPA"), 12 U.S.C. 3407, Maj. Ohlweiler through an unauthorized process or subpoenas obtained the Flowers financial records. See 12, U.S.C. 3407. ("A Government authority may obtain financial

---

[5] CR indicated the court record and document numbers for both cases First Hawaiian Bank, No. 99-00335 and Fort Jackson Federal Credit Union, No. 01-00412.

[6] Sgt. McBride during the course of the proceeding went by another unknown name but was the legal clerk for Maj. Denise Ling, the Trial Defense Officer in charge

records under section 3402(4) of this title pursuant to a judicial subpoena only if (1) such subpoena is authorized by law...(2) a copy of the subpoena has been served upon the customer or mailed to his last known address on or before the date on which the subpoena was served on the financial institution...[.]) (Pet. App. 103a) see also 32 Code of Federal Regulation, part 504((e) Judicial /subpoena ("The notice and challenge provision of 12 U.S.C 3407 and 3410 will be followed.) Id. at 125a

Flowers sensed something unusual about he hearing when Maj. Ohlweiler uttered words to the effect that "financial records on SGM Flowers may be damaging" and presence of civilian females as witnesses for reasons unknown. Most importantly, Col. Maschek was unaware and did forward charges to General-Court martial. The hearing was orchestrated by Maj. Ohlweiler as another method of intimidation. Finally came Government counsel utterance to Maj. Ryan "take your time finalizing the report, we've reached an agreement."

Flowers dated the MOA-1 prior to Mr. Gittins' departure on June 26, 1998 which he gave to Maj. Lind. Then Maj. Lind departed in mid-July 1998 for graduate schooling absent obtaining and providing a copy of the IO report, dated 16 Jul 98 to Flowers.

Flowers had not received the IO report but as instructed reported to Trial Defense Office where Capt. Graff gave Mr. Flowers a document titled "Government Offer to Dispose Charges by Article 15 UCMJ " that provided two choices; non-judicial punishment or General Court-martial. (CR 350/372). Mr. Flowers checked the block demanding trial by court-martial but Capt. Graff refused to recognize that right. See M.C..M. (1995) Part V-2. Then Capt. Graff consistently, from June 26, 1998 to August 28, 1998, informed Flowers that the MOA (if defined under Rule 705-though no General-court martial convening authority's signature appeared on the memorandum. Capt. Gaff consistently pressured

Flowers and insisted MOA-1 could not be terminated.[7]

As ordered on August 19, 1998, Flowers reported before LTC Halstead for reading of an Article 15 and there received a (1) signed MOA with LTC Halstead's signature, dated August 4, 1998, 2) (Admin. R. at 708) assumption of command orders for August 17-21, 1998 (Id. at 707, and 3) withdrawal and dismissal of charges. The Army failed to dismiss with prejudices 42 specifications of Larceny. (emphasis added)). No allied documents or evidence accompanied DA From 2627. See AR 27-10, ¶ 3-18 (The soldier will be provided a copy of DA Form 2627 and supporting documents and statements, for use during the proceeding) see also MCM, part V, 4c. (1)(D) (the service member shall be entitled to ...be allowed to examine documents or physical objects against the member which the non-judicial authority has examined in connection with the case and on which the non-judicial authority intends to rely in deciding whether and how much non-judicial punishment to impose.)

The charges were read. CR 350/372 [8] Flowers requested documentation and evidence to support the charges as read, LTC Rebecca Halstead replied "no other documentation was available,"

---

[7] Manual for Courts-Martial, Rule 705 governs pretrial agreements with terms and conditions: (A) Not voluntary. A term or condition in a pre-trial agreement shall not be enforced if the accused did not freely and voluntarily agree to it. (B) Deprivation of certain rights. A term or condition in a pre-trial agreement shall not be enforced if it deprives the accuse of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court martial; the right to a speedy trial; the right to complete sentencing proceeding; the complete and effective exercise of post-trial and appellate right. R.C.M. 705 © M.C. M. Rule 705(4) (A) states "[t]he accused may withdraw from a pre-trial agreement at any time, however, the accuse may withdraw a plea of guilty or a confessional stipulation entered pursuant to pre-trial agreement only as provided in R.C.M. 910 (h) or 811(d), respectively.

[8] Non-judicial punishment may not be imposed for offenses which were committed more than two years before the date of imposition. See AR 27-10, para, 3-12.

indicating the proceeding was based upon the MOA-1.

B. The Non-Judicial Proceeding procedure (Article 15)

On August 25, 1998 Flowers appeared before COL. Eddie Coleman ("Col. Coleman"), Commander, Division Support Command, 25th ID(L), Schofield Barrack, Hawaii, rejected the Article 15 and demanded trial by court martial. Flowers also expressed concern regarding non-receipt of the IO report, lack of IMC communication[9] regarding the report and failure of command to investigate complaints. Col. Coleman failed to accept Flowers demand for trial by court-martial, and suspended the hearing until receipt of the IO report.

Just prior to scheduled hearing on August 28, 1998, Capt. Graff provided Flowers with an undated copy of the IO report and a "Memorandum of Agreement for Alternate Disposition of Court-Martial Charges (MOA-2) that included signature Mr. Gittins, and Col. Coleman, dated 22 Aug 98 and 28 Aug 1998 respectively, and Plaintiff's signature.[10]

The language of MOA-2 ("SGM Flowers has consulted with military and civilian counsel prior to entering this agreement. Counsel concur this agreement is in the best interest of SGM Flowers based upon the evidence adduced at the Article 32 hearing in the above-captioned case) differed from MOA-1 with plaintiff's signature, dated Jun 26, 1998 and significantly sought to downplay the Army's failure to dismiss the charges with prejudices in accordance with MOA-1.

FJFCU's response brief ("Br. Resp. FJ) incorrectly states

---

[9] Right to counsel-the soldier will be informed of the right to consult with counsel and the location of counsel. See AR 3-18 (b)(2)©.

[10] Flowers cannot recall voluntarily entering into this agreement but believes the document is the result of coercion and deception instigated by Capt. Graf. Particularly, since Mr. Gittins contractual representation terminated upon completion of one Article 32 hearing.

"[t]he Article 15 hearing was held on August 28, 1998. 'Flowers and military defense counsel attended.'" Br. Resp. FJ at 9. Flowers never consented to Capt. Graff's representation but gave consent to Capt. Donna M. Bovina as assistance defense counsel.

Flowers was accompanied to the hearing by Mrs. Flowers to the hearing. Present also was Col. Eddie Coleman (SPCM authority), Maj. John Ohlweiler, Capt. Peter Graff, and an unidentified officer. Col. Coleman asked Flowers "if there is anything to you won't to say" or words to that effect." Mr. Flowers responded with "what documents and evidence you intend to use in determining guilt and punishment?" Col. Coleman replied "I saw the films" even though the Record of Proceeding Under Article 15, UCMJ, line 11 excluded documents or any evidence.[11]

The Army disregarded AR 27-10, para 3-18 (The soldier will be provided with a copy of DA Form 2527 and supporting documents and statements, for us during the proceeding, examine available evidence). Capt. Ohlweiler served as an instrument of trial to intimidate and harass and through an illegal process obtained the signature on a document that allegedly attempt to shield the Army's failure to dismiss the charges with prejudices. (emphasis added)

Col. Coleman determination of guilt according to his response was based upon "films" and he discharged punishment as follows:

a) forfeiture of $1788.00 per month for two months

---

[11] The soldier shall "be allowed to examine documents or physical objects against the member which the non-judicial authority has examined in connection with the case and on which the non-judicial punishment authority intends to rely in deciding whether and how much punishment to impose" R.C.M.(1995), Part V, 4c (1) (D) see also AR-27-10,para 3-18 ("The soldier will be provided with a copy of DA form 2627 and supporting documents and statements, for use during the proceeding")

b) a formal written reprimand

To include the Army keeping (1) personal properties the Government seized from their quarters and (2) forced retirement

After discharging punishment, Col. Coleman informed Flowers "you have five (5) days to appeal to the commanding general." Col. Coleman neither stated nor Flowers signature on DA From 2727, line 7 or inquired whether plaintiff intended to appeal. [12]

Flowers submitted a timely appealed on August 31, 1998. Maj. Ohlweiler seized control of the appeal, controlled all documentation and without providing access to the appeal informed Flowers through Maj. Reineke the appeal was denied.

In October 1998 MG Hill was briefed from the Staff Judge Advocate. Absent counsel, Flowers was at a disadvantage to be heard. The tainted process caused Maj. General Hill to withdraw or negate the Article 15 and start another Article 32 proceeding when he withheld the forwarding and prosecution of charges,

C. The Commanding General's Withdrawal of the Article 15 and Subsequent Article 32 Hearing

---

[12] If, at the time of imposition of punishment, the soldier indicates a desire to appeal, the superior authority may reject a subsequent election to appeal, even though it is made within the five-day period. AR 27-10, para 2-29(b). All appeals will be made on DA From 2627 or DA 2627-1 and forwarded through the imposing commander...[.] Id. at 3-31. A soldier is not required to state the reasons for the soldier's appeal. Id. The imposing commander...may take any action on the appeal, with respect to the punishment that the superior authority could take (para 7, Part V, MCM, and para 3-33 of this regulation) Id. 3-32. When the soldier desires to appeal, the imposing commander, or the successor in command will make available to the soldier reasonable assistance in preparing the appeal and will promptly forward the appeal to the appropriate superior commander. Id.

Charges were re-preferred on November 13, 1998 after. Maj. Ohlweiler contacted Capt. Franklin M. Kang, a military lawyer assigned to 25th ID administrative law branch and provided him documents to include previous Article 32 investigative report. Maj. Ohlweiler requested he consider charges for re-preferral. See Article 32 IO Report, date March 29, 1999. CR 432. ("Capt. Ohlweiler asked me to come to Schofield. He may have said something about preferring charges, I can't remember. Major Leakehe directed me to call Captain Ohlweiler. I came up to Schofield, looked at 3 binders of evidence, and video taped evidence... '[a]t one point I asked Capt. Ohlweiler why I was preferring charges instead of the commander. He told me it was because of a conflict with the commander and they needed someone with objectivity") but see Commanding General Memo dated November, 20, 1998, ("...I hereby withhold authority for the forwarding, pretrial investigation, and disposition of charges in the case of United States v. SGM Marshall K. Flowers.")(emphasis added) See also Maj. General Hill's video deposition .CR 377

On or about November 17, 1998 the Article 15 punishment was formally withdrawn; charges (Article 121, Larceny and Article 81, Conspiracy) re-preferred were -preferred; a new Article 32 hearing scheduled with Capt. Kimberly Hunta, a Staff Judge Advocate Officer as IO, HHC 25th ID assigned as IO. On November 23, 1998 Maj. Reineke informed Flowers the Article 32 punishment was formally withdrawn and someone higher than he would decide the case.

The Article 32 investigation started on November 25, 1998 but Flowers individual military counsel, Maj. Denise Lind had departed Hawaii and Flowers was without counsel. /the hearing was suspended until resolution of who would represent Flowers.

There Flowers first realized the Army had their financial records First Hawaiian Bank that included a subpoena and financial statements and records from FJFCU documents that

consisted of financial records absent a subpoena. Flowers replied "I have not seen or received a copy of these documents." At which Capt. Hunta replied "a copy will be provided." [13]

When the Article 32 hearing reconvened on March 18, 1999, for charges of violation of Articles 121 (Larceny) and 81 (Conspiracy), [14] and completion on March 19, 1999 through counsel Flowers objected to the report due to prejudicial effect that may have resulted from Captains Kang and Huhta's receipt of the previous Article 32 investigative report by Maj. Timothy Ryan. Maj. Lewenhaupt assigned as Flowers military counsel declined to object to the report within specified (5) days.

On or about April 1, 1999 Flowers were officially informed by Maj. Reineke and Maj. Lewenhaupt that the Article 32 investigation officer would not recommend trial by General court-martial. Thereafter, on April 6, 1999, Maj. Lewenhaupt gave Flowers an unsigned copy of Capt. Huhta's investigative report and surprisingly requesting his signature on the previous withdrawn Record of Proceeding Under Article 15, UCMJ that now requested Flowers signature on Line 10 ("I have seen the action taken on my appeal") CR-350/372 .

Without waiving Flowers' objection to defendants' allegation

---

[13] The binder's contents revealed plaintiff's and spouse' financial records obtained through unauthorized subpoenas from First Hawaiian and Fort Jackson FCU. A letter from FHB mailed in July 1998- allegedly notified Mr. Flowers that the Government had requested records occurred -after the Article 32 hearing on June 25-26, 1998 and records were provided to the Government.

[14] The Court's opinion and order, dated 1 March 2007 stated that the Article 32 hearing held on November 25, 1998 (See Opinion, # 12# 6) and "[t]he individuals present at he Article 32 hearing included:...Trial Counsel Captain John Ohlweiler. See n.13. Where that is true. The hearing was suspended for counsel related issues and when the hearing reconvened at 1350 hrs on March 18, 1998, the legal officer (JAG) representing the Government was Maj. Saul Contreas. Id. at 822.

of scanned and white out copies of receipts, and search authorization and seizure, the IO report was completed on March 29, 1999 and through Flowers' objection stated:

...The acts alleged to commit the conspiracy include "scanned" and "white out" copies of AAFES and NEX receipts and three specific thefts of property committed by SGM Flowers between 7-13 December 1997. To have a conspiracy, it is necessary that the accused 1) the accused entered into an agreement with a person to commit an offense and 2) while a party to the agreement, the party or co-conspirator committed a overt act to bring about the conspiracy.

There was no evidence presented that SGM Flowers or his wife ever used a fraudulent receipt to complete a return...SGM Flowers is accused of stealing various amount of currency from AAFES and NEX by returning stolen items for a refund. The elements of larceny are:

1) accused wrongly took property from the possession of the owner, 2) that the property belonged to a certain person, 3) that the property was of a certain value; and 4) that the taking was with intent to permanently deprive or defraud the person of the use and benefit of that property.

1) *Regarding these three specification, <u>there is no evidence that SGM Flowers stole the items that were returned to AAFES or the NEX for a refund</u>. There is no proof SGM Flowers "wrongfully took " the items. Neither SA Ebert or Ms. Huffman could not identify any item returned for a cash refund as being property previously stolen from AAFES or NEX. Testimony by both witnesses indicated that AAFES or the NEX would accept any item they stock for a refund regardless of where the item was obtained. For instance, an item obtained from Walmart can be returned to AAFES for a refund if AAFES carry the item. There is <u>no proof that any item returned to AAFES or the NEX was stolen prior to its return</u>.*

The government has included documentation regarding SGM Flowers' finances, with the intent of demonstrating SGM Flowers' inability to purchased the items returned.

However, as I stated previously, the burden of proof remains on the government to prove SGM Flowers committed all the elements of offense of larceny. The government cannot conclusively prove any of the items returned were in fact stolen by SGM Flowers or Mrs. Flowers. I do not recommend proceeding with a court-martial because the evidence does not support a finding beyond a reasonable doubt.

See CR, Exhibit "B" at 432

D. The Army's Bar to Reenlistment as Punishment and Utilization of Withdrawn Article 15 in Support.

FJFCU brief states that "General Hill and military prosecutors" apparently had decided to proceed with a General Court martial...[a]t this point Flowers term of service had expired. As an enlisted soldier, he needed to reenlist. " Br. Resp. at 9. Flowers immediate supervisor imposed a formal "bar to re-enlistment, effectively ending his military career at 28 years. The bar to reenlistment cited the previous non-judicial punishment (the Article 15 proceeding and of violations of Article 121). Id. at 10

It was obvious Maj. Ohlweiler's pivotal role in the charges, issue of the illegal subpoenas, Article 15 and subsequent bar to reenlistment was a retaliatory effort destroy Flowers career through protecting his own, particularly, in his position as SAUSA, the very same office defending the government case.

On June 21, 2003 the defendants conspired to prevent Petitioners appearance at deposition of General Hill. The following questions and answers transpired it the deposition of General James Hill with Fort Jackson Federal Credit Union's counsel presenting

questioning.

(This session raises questions regarding SGM Flowers' appeal of the non-judicial punishment (Article 15) submitted to then MG Hill, Commander, 25th Infantry Division)

Q. General Hill, why did you deny the appeal?
A. I denied the appeal because the original charges were sufficient to warrant the Article 15. In accepting the Article 15, he acknowledged guilt in the matter and accepted the punishment meeted out by the authority in this case, Col. Coleman. And what the appeal is for is to say that the punishment is too severe. I felt like the punishment was not severe against these charges

Q Sir, What effect, if any, did any financial records of Mr. Flowers have to do with your decision to approve the Article 15 punishment?
A. None whatsoever

Q. Now, General Hill, it is my understanding that the Army at this point in the proceeding against Mr. Flowers you had lived up to its part of the bargain"
A. We had indeed.

Q. In fact, the Army had dismissed the charges without prejudices against Mr. Flowers
A. We had indeed.

Q. In fact, the Army had pursuant to the agreement issued an Article 15 punishment which we just covered.
A. Correct

Q. Sir, do you know whether or not Mr. Flowers lhad ended up--had, I'm sorry, had lived up to his end of the bargain?
A. He did not

Q. As a result of that, do you know what you instructed your staff

to do?
A. We put a bar to re-enlistment on him, we extended him on active duty--as I recall while he worked further appeals, and we initiated another Article 32 because we reconvened the charges.
Q. Okay. And why did you reconvene the charges.
A. Because part of the agreement was that he would accept the Article 32 and retire

Q. you mean accept the Article 15
A. And when he did not retire, then I negated, as I had the legal right to do, I negated the Article 15, initiated an Article 32 to reconvene general court-martial charges against him. CR 377

Assuming under oath, the deposition testimony of General Hill, not subject to cross examination is true, General Hill negated the Article 15- to as he testified initiate [another.] another Article 32 to reconvene general court-martial charges.." Id.
Merriam Webster defines "negate" as 1) to deny existence or truth of; 2) to cause to be ineffective; nullify. The basis of which the negated Article 15 (that which was ineffective) served as the basis for the bar to reenlistment.

The Government denial of discovery and General Hill's deposition demonstrate the significance of prejudices petitioners encompassed litigating their claims. Flowers stated throughout the process-the choice was retire or face a court-martial and when Flowers chose to vindicate him through court-martial, the negated Article 15 now served to bar reenlistment but more so denied due process

Based upon the investigation report, dated March 29, 1999, the conduct of previous Article 32 proceeding; unsubstantiated allegation of larceny and conspiracy absent any credible and admissible facts, and more importantly to protect his interest[15] for

[15] 32 C.F.R., Part 504 states un-categorically "[o]btaining or disclosing financial records or financial information on a customer from a financial institution in violation of the act or this regulation may subject the Army

intentional violation of the RFPA, the last available option was "make Flowers go away" through a bar to reenlistment.

On April 27, 1999, under Army Retention Program, AR 601-280, Chapter 8, Maj. Reineke was ordered to initiate a bar-to-reenlistment contrary to MG Hill's memorandum withholding authority of commanders in forwarding, pretrial investigation, and disposition of charges.

Army Retention Program, para 8-2(b) states:

> The Bar to Reenlistment is not punitive action but is designed for use as a rehabilitative tool. The Bar to Reenlistment should be initiated prior to a Separation or judicial/non-judicial action because it is intended to put the soldier on notice that:
>
> (1) He or she is not a candidate for reenlistment.
> (2) He or she may be a candidate for separation if the circumstances that led to the Bar to Reenlistment is not overcome

See AR 601-280, para 8-2(b)

> Bar to Reenlistment will not be used instead of trial by court-martial, non-judicial punishment, or other administrative action. Id. at para 8-3(c). (emphasis added).

Through personal telephone call to JAG, Army Retention ranch Maj. Ohlweiler successfully orchestrated-contrary to regulation-having a civilian Ronald L. Canada Chief, Retention Management Branch state in a memo, dated June 21, 1999 in response to Flowers appeal of the bar to reenlistment that " [r]equest for appeal to the Bar to Reenlistment for SGM Flowers

---

to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees. Military and civilian personnel who willfully or intentionally violate the Act or this regulation may be subject to disciplinary action. 32 C.F.R. 504.2 (l)

cannot be favorably considered. 'SGM Flowers has not presented sufficient justification to warrant approval of his request for an appeal to the Bar to Reenlistment." [16] See AR 601-280. at para 8-5(e)(2) ("For soldiers with more than 10 years active federal service at the date of bar initiation, the approval or disapproval authority is CG, PERSCOM") Id. at para 8-5(e)(2)

Flowers was "made to go away" from the military into involuntary retirement with 28 years of honorable service on February 1, 2000.

III. ARGUMENT

Defendants rely chiefly on this Court's decision in Feres v. United States, 340 U.S. 135 (1950) proposition that the Army issue of illegal subpoenas for petitioner's financial records and retaliation effort to involuntary dismiss Flowers from the Army excludes this Court review. Further, the Government argues that because the opinion is unpublished and thus does not constitute binding precedent within the Ninth Circuit (Gov. Oppos. Br. At 8.). The obvious conclusion here is the government appears to say to the court the opinion is non-binding so bases on the specific facts of this case-that is the allegation that "Army officials had willfully violated the RFPA" as part of a military conspiracy to press false disciplinary charges."

The Right to Financial Privacy Act is statutory law, applicable to "Government authorities," the statue is promulgated by the Army in 32 CFR, Part 275 and 504, and Army Regulation 190-6 Obtaining Information from Financial Institutions. The statue and regulations prescribes penalties for violation by Government authorities as stated in petitioners Appendix. See 111a, 113a, and 159a.("Obtaining or disclosing financial records or financial

[16] Essentially, MG Hill became the accuser by withholding forwarding, investigation, and punishment of charges from subordinate commanders but ordering Maj. Reineke to initiate the Bar to Reenlistment that circumvented regulation.

information on a customer from a financial institution in violation of this regulation may subject the Army to payment of civil penalties, actual damages, punitive damages as the court may allow, and cost with reasonable attorney fees.)
Because Petitioners seek to enforcement pursuant to the statue and regulations and in absence of any wrongdoing, the Government should not be permitted to reign sovereign over the law it enacted, a law to control its behavior.

IV. CONCLUSION

Respectfully, the decision of the lower court dismissal pursuant to Feres and affirmation by the Ninth Circuit of appeals were in error. Therefore, the United States Supreme Court should grant petitioners certiorari.

Respectfully submitted

Marshall K. Flowers

MARSHALL K. FLOWERS
P.O. Box 29632
Honolulu, Hawaii 96820
Phone: (808) 256-2279

ANNA FLOWERS
50 Albert Street
Goodwood 5034
Adelaide, South Australia
Australia

Petitioners pro se